

October 23, 2002

D.P.U./D.T.E. 97-95

Investigation by the Department of Telecommunications and Energy, on its own motion, into Boston Edison Company's compliance with the Department's Order in D.P.U. 93-37.

Hearing Officer Ruling on Boston Edison Company's Motion for
Continued Protective Treatment

On December 28, 2001, the Department of Telecommunications and Energy ("Department") issued an Order in the above-docketed matter that, among other things, (1) granted Boston Edison Company's ("BECo" or "Company") request¹ for protective treatment of certain responses to discovery not admitted into evidence; and (2) determined that the protected status of exhibits shall expire two years from issuance of the Order, and the protected status of discovery responses not admitted into evidence shall expire one year from issuance of the Order. Boston Edison Company, D.P.U./D.T.E. 97-95, at 8. The Department further stated that BECo could file a request to extend the expiration of protected status for specific exhibits and/or discovery responses, along with appropriate support for such request. Id.

On January 18, 2002, BECo filed a Motion for Continued Protective Treatment ("Motion"). BECo asked that one exhibit and four discovery responses² be granted indefinite confidential treatment. The Company explained that Exhibit AG-RSH-26 and discovery response CSC-2-39 include agreements with third parties. BECo argues that it would be unfair to those entities to disclose these agreements (Motion at 2). BECo also explained that discovery responses CSC-2-116; CSC-2-117; and CSC-2-118 consist of internal audit reports, which reflect the company's self-assessment. BECo contends that continued protection is needed "in order to preserve the integrity and effectiveness of the internal audit function."

¹ BECo's requests were set forth in its Further Motion for Protected Treatment dated August 21, 1998 and subsequent letter dated September 10, 1998, modifying its Request; and in its Motion for Protective Treatment dated October 16, 1998.

² The exhibit is Exhibit AG-RSH-26; the responses to discovery requests are: CSC-2-39; CSC-2-116; CSC-2-117; and CSC-2-118 (Motion at 1).

The Department requires that requests for protective treatment be accompanied by a statement in support; that the request precisely identify the portion for which protection is sought (see D.P.U./D.T.E. 97-95, at 14, Interlocutory Order on Motion for Order on Burden of Proof; Proposed Non-disclosure Agreement; and Requests for Protective Treatment (July 2, 1998)); and that the request specify the length of time for which protective treatment is sought. See e.g., Verizon Alternative Regulation, D.T.E. 01-31-Phase I, at 10, Interlocutory Order on Verizon Massachusetts' Appeal of Hearing Officer Ruling Denying Motion for Protective Treatment (August 29, 2001); Rate Center Consolidation, D.T.E. 98-38, at 10, Order to Close Investigation (2002). The rationale behind this policy is to comply as fully as possible with the underlying presumption set forth in G.L. c. 25, § 5D that information filed with the Department is public unless determined otherwise. An additional benefit of this policy is that it shifts the administrative burden to the proponent, who is by far in the better position to explain the need for confidential treatment and to determine when that need will expire.

While BECo's explanation for its request for protective treatment generally meets the standard of review under G.L. c. 25, § 5D, BECo does not sufficiently explain the need for indefinite or permanent protection, other than to say that the need remains unchanged from the time of the original ruling (Motion at 2-3). With regard to Exhibit AG-RSH-26 and discovery response CSC-2-39, the Company argues that disclosure of third-party agreements³ is unfair but does not specify when the agreements expire nor explain why the protective order should continue beyond expiration of the agreements. To that end, the Company's Motion with regard to Exhibit AG-RSH-26 is denied at this time and the exhibit will become public on December 28, 2003 as previously determined. For the same reason, the Company's Motion requesting indefinite protective treatment for discovery response CSC-2-39 also is denied. Although the Company's rationale for continued protective treatment is slightly more compelling with regard to the remaining discovery responses, there again the Company fails to explain why the need for protective treatment will never end. For purposes of administrative efficiency, the Company's responses to discovery requests CSC-2-39; CSC-2-116; CSC-2-117; and CSC-2-118 shall be granted an extension of confidential treatment until the same date as Exhibit AG-RSH-26, i.e., December 28, 2003. BECo may renew its request for extended protective treatment for the exhibit and discovery responses before expiration of the protective order. Such a request, however, must this time address squarely the particular need for indefinite protective treatment.

³ The Department has previously held that "denying access to relevant data that supports a party's case because of binding third-party agreements . . ." will not be tolerated. UNE Rates, D.T.E. 01-20, at 36 n.26, Interlocutory Order (October 18, 2001). Here, the Company has provided the third-party agreements subject to protective order. However, the underlying rationale in the UNE Rates Interlocutory Order is not inconsistent with the presumption in G.L. c. 25, § 5D that all documents filed with the Department are presumed to be public record.

In conclusion, Exhibit AG-RSH-26 and discovery responses CSC-2-39, CSC-2-116, CSC-2-117; and CSC-2-118 shall remain confidential until December 28, 2003. BECo may, if it wishes, request continued protective treatment before that date. Such request must be accompanied by supporting documentation.

Under the provisions of 220 C.M.R. § 1.06(d)(3), any affected person may appeal this ruling to the Commission by filing a written appeal with supporting documentation by October 30, 2002. A copy of this ruling must accompany any appeal.

Yvette Bégue
Hearing Officer